IN THE

Supreme Court of the United States

LEONIDAS M. LAWSON, ET AL., Petitioners,

vs.

UNITED STATES MINING COMPANY, A CORPORATION, Respondent.

BRIEF FOR PETITIONERS.

The complainant's brief is an argument solely on the merits. It is not directed in any part of it, to the question of whether the case is one in which the petition for the writ of *certiorari* ought to be granted.

By implication, the argument of counsel would seem to concede, that the writ might well be granted, but granting it, the decree directed by the Circuit Court of Appeals ought to be affirmed.

Such concession, however, whether it be express or implied, can be of no weight with your Honors, in determining whether the petition presents a case which will justify this court, under the statute, and under a proper construction and application of it, in granting us the writ prayed for. We shall not, therefore, reply to the discussions of their brief, further than we shall think it necessary to explain, that the questions involved in the case are such as warrant the court in granting us this writ. In the first

place you have said that the writ will be granted, but sparingly.

Forsyth vs. Hammond, 166 U. S. 506.

It is obvious that it ought to be granted only, in exceptional cases and for specified causes, otherwise the purpose of the statute creating the circuit courts of appeals might be defeated. We think this is one of the exceptional cases, and within the rule established by the decisions of this court, in which the writ of *certiorari* will be granted. But it is necessary to state the matter in issue with all possible exactness and clearness. For the purpose of this argument, and the decision of your Honors, on this application, it may be stated thus:

By the amended bill of complaint, the respondent alleges that it is the owner, in possession and entitled to the possession, of certain lode mining claims in the West Mountain Mining District, Salt Lake County, Utah, called the Northern Light, the Jordan Extension, the Grizzly and Fairview claims, and of all the metalliferous ores existing and found vertically beneath the surface thereof, and that there are ores there found, of great value, to-wit, of the value of more than $10,000. (Par. 6, Amend. Bill, Record, p. 4.)

That the defendants "by means of secret underground works, drifts, excavations and openings, commencing at a long distance on the surface from said mining claims, and to which your orator has no access, without the knowledge or consent of your orator, *entered in and upon* said Jordan Extension mining claim, the Northern Light mining claim and the Grizzly mining claim, and beneath the surface thereof, have mined, extracted and removed and converted to their use, large quantities of valuable ores and mineral therein, the property of your orator. (Par. 7 of Bill, Record p. 5.)

That the ores thus found underneath those claims, are ores which are contained in a certain lode which has its apex in two other lode mining claims belonging to complainant, to-wit, the Old Jordan Mining Claim, U. S. Lot 64, and the Mountain Gem Mining Claim, U. S. Lot 475, which lie to the south of Jordan Extension, Northern

Light, Grizzly and Fairview claims above mentioned, and that the defendants pretend that the ores so found, are contained in a lode which has its apex in the Kempton Mining Claim, U. S. Lot No. 55, and that it is in the lode thus apexing in Jordan and Mountain Gem ground, which defendants have *entered*, and to which they wrongfully assert title. (Par. 8, Amended Bill, Record pp. 6 and 7.)

The defendants in the amended answer deny the material allegations of the bill, and in the answer they aver affirmatively, that they are the owners, in the possession and entitled to the possession under patented titles thereto, of the Kempton Lode Mining Claim, U. S. Lot 55, and the Ashland Lode Mining Claim, U. S. Lot 67. (Record, pp. 30 to 32, 37 to 38.)

That there is a large lode apexing within the exterior surface boundaries of each of said claims. That in its descent into the earth, it departs from a perpendicular insomuch, that it dips under adjacent surface ground, and particularly under the surface of said Northern Light, Jordan Extension, Grizzly, and Fairview claims, and that it is in following the dip of the lode thus apexing in Kempton and Ashland ground that they have *entered* underneath said Northern Light, Jordan Extension, Grizzly, and Fairview claims, in virtue of the fact that the lode apexes in Kempton and Ashland ground and not otherwise. (Record pp. 31 to 32 and 38 to 39.)

It is thus seen, the case involves the question of the legal title and right to possession of a lode which has its apex outside of Northern Light, Jordan Extension, Grizzly, and Fairview claims. This apex exists in a conflicting area between the Kempton and Ashland claims, on the one part, and the Old Jordan and Mountain Gem on the other.

The real question then is, which of these parties has the older, the better and superior title to the apex of the lode within this conflicting area, and therefore to the necessary extralateral rights which are legally incident thereto. A mining apex case of greater simplicity can scarcely be imagined.

Whatever complexities the record may show, have certainly arisen from dragging into the record, and into

the discussions matters which do not touch this simple issue which is above stated. Now we have said the question is, which of these parties has the superior title to the apex of the lode which contains the ores in question. At the trial in the Circuit Court the defendants relied on their patents to the Kempton, U.S. Lot 55, and the Ashland, Lot U. S. 67, as giving them a complete title to the apex within the conflicting area in question. These patents were introduced in evidence. (Record, pp. 115 and 137.)

The Kempton patent U. S. Lot 55 was issued and is dated February 23rd, 1875. The Ashland patent U. S. Lot 67, was issued, and is dated September 27th, 1875. These patents are prior to, and older than, the Old Jordan, and Mountain Gem patents, which were issued, and are dated July 14th, 1877, and July , 1898, respectively, or about two, and twenty-three years, respectively, after the Kempton and Ashland patents. Besides this, there are express exceptions and exclusions in both the Jordan and Gem patents, of the conflicting apex area, in favor of the Kempton and Ashland patents. The exception in the Jordan patent is as follows: "It being the express intent and meaning of these presents to convey to the grantee herein fifty-two hundred (5,200) linear feet of the said Jordan Silver Mining Company's mine, together with the surface ground hereinbefore described, which is not embraced by said surveys Nos. 39, 53, *55*, *67* and 69, as represented by yellow shading in the following plat."

See Jordan patent, as set out in the petition herein, p. 37, and a copy of the plat opposite page 9. The exception in the Mountain Gem patent is as follows:

"Expressly excepting and excluding from these presents, all that portion of the ground hereinbefore described embraced in said mining claims or lots Nos. *55*, 64, and 366, and also all that portion of said Mountain Gem vein or lode and of all veins, lodes and ledges throughout their entire depth the tops or apexes of which lie inside of such excluded ground; said Lot No. 475 extending four hundred and seventy and thirty-five hundredths feet in length along said Mountain Gem vein or lode; the granted prem-

ises in said lot containing sixty hundredths of an acre of land, more or less."

See Mountain Gem patent, as set out in the petition herein on page 42.

On the opposite page of this brief as well as opposite page 9 of the petition, is set out a copy of the plat attached to and made a part of the Jordan patent, which shows the part of the claims and the apex of the so-called broad lode, which is excluded from the Jordan and Gem patents in favor of the Kempton and Ashland patents, by the above recited exceptions. The portions granted being in yellow, and the parts excluded being in white.

When at the trial in the Circuit Court the complainant came to rebut the defendant's title as evidenced by the Kempton and Ashland patents, it offered in evidence a certain notice of location of the Old Jordan claim dated September 17th, 1863. It is set out in the record as complainant's Exhibit "V." (Record page 321.)

And also a certain other notice of location of the Mountain Gem claim dated August 20th, 1864, which appears in the record as complainant's Exhibit "Z." (See Record, page 329.)

To this offered evidence the defendants objected that it is immaterial what the date of the location of those claims was, because the Kempton and Ashland patents are prior to the Jordan and Gem patents. The complainant said it is true that the Kempton and Ashland patents are older than the Jordan and Gem patents, but the Jordan and Gem claims were *located* before the Kempton and Ashland claims were located, and therefore the junior Jordan and Gem patents relate back to the date of location of the Jordan and Gem claims, and therefore, these junior patents constitute by relation a superior title to the senior Kempton and Ashland patents; and are a better title to the ground in dispute. That by reason of the priority of location of the Jordan and Gem claims, over the Kempton and Ashland claims, the exceptions and exclusions in the Jordan and Gem patents in favor of the Kempton and Ashland patents, do not constitute an estoppel by deed, against

the title of complainant acquired in virtue of the locations of September 17th, 1863, and August 20th, 1864.

The Circuit Court admitted these notices of location in evidence under objection *pro forma*.

It may be here noted, that at the trial in the Circuit Court, the rule which requires the testimony in an equity case to be taken before a master or an examiner, was relaxed, and the testimony was taken in open court, the same as in law cases tried without a jury.

When the Circuit Court came to the decision of the whole case, it decided that the doctrine of relation does not apply to such a case, but that, notwithstanding the alleged priority of the Jordan and Gem locations, the senior patents of the Kempton and Ashland claims constitute a superior title to the apex of the part of the lode in dispute. That the express exclusions and exceptions in the Jordan and Gem patents in favor of the Kempton and Ashland patents constitute an estoppel by deed, against the assertion by the Jordan and Gem owners, to the apex of the lode within the conflicting area. It therefore gave judgment in favor of defendants by dismissing the bill absolutely. In thus deciding, the Circuit Court put its decision in harmony with the decision of the supreme court of Utah, in the case of Lavignino vs. Uhlig, 26 Utah 1. And also with the decision of this court in affirming it.

See decision of this court in Lavignino v. Uhlig, May 29th, 1905.

And also in harmony with the decision of Mr. Justice Brewer in Wight vs. Dubois, 21 Fed.

And also with the opinion in the celebrated Eureka vs. Richmond case, wherein Mr. Justice Field distinctly and emphatically decided that the doctrine of relation does not apply in such a case.

In the opinion in that case, after stating certain conditions under which the doctrine of relation applies in certain cases, that eminent jurist said:

"But this principle has been qualified in its application to patents of mining ground by provisions in the Act of 1872 for settlement of adverse claims before issue of patent.

"Under that act, when one is seeking a patent for his mining location, and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterwards be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents, so as to cut off intervening claimants, if any there be, deriving title from other sources, such perhaps as might arise from subsequent location of school warrants, or a subsequent purchase from the state, as in the case of Heydenfeldt vs. Daney Gold Mining Co., reported in third of Otto, the doctrine can not be applied, so as to cut off the rights of an earlier patentee under a later location, where no opposition to the location was made under the statute. The silence of the first locator is, under the statute, a waiver of his priority."

Eureka Con. M. Co. v. Richmond M. Co.,
4 Sawyer's Rep. 302;
9 Morrison's Min. Rep. 592.

And on the question of the estoppel by deed, the decision is in harmony with the decision of this court in the case of Maxwell Land Grant Co. vs. Dawson, 151 U. S. 586-604, wherein you decided that whoever relies upon a deed which contains an exception must plead and prove that he is without the exception, otherwise he is estopped to assert that his title is superior to him in whose favor the exception is.

All this the decision of the circuit court of appeals has set aside and overthrown. It is because such determinations are contrary to the decision of the supreme court of Utah and of this court in a like case, and all other decisions to which we have come, that we respectfully ask this court, "in the interest of jurisprudence and uniformity of decision, and to avert diversity of judgments, and to guard against inadvertence of conclusion in controversies involving weighty and serious matters" to re-

view these matters and make a definite and final pronouncement thereon.

The counsel for the respondent perceive the certain error in the decision of the circuit court of appeals which is manifested by the simple statement of the case as it is set out in our petition for the writ prayed for. They, therefore, flatly deny on page 38 of their brief, that such propositions of law were before the circuit court of appeals for its decision. On this point the record is against them. Let us recur to the record.

At page 320 of the printed record occurs the following:

"And thereupon said plaintiff, to further maintain the issues on its part, in rebuttal, gave in evidence the following, that is to say:

MR. SUTHERLAND: We will offer our title to the Jordan and Mountain Gem Mining claims. The first is the Old Jordan. I offer in evidence what purports to be an exemplified copy of the various papers upon which the patent to the Old Jordan was granted, including the patent itself, certified to by the Commissioner of the General Land Office, *the purpose of it being to show that the patent in addition to proving title to the claim, that the patent was granted upon the location notice which was annexed to the transcript showing the location in 1865. We claim that this vein is a broad vein, not merely the ore body which they have testified to, but it is a vein which is from 125 to 200 feet in width, and that their claim is laid upon a part of the width of the apex, and we claim that the* Jordan and Gem are laid at another part of the width of the apex, and we claim that under the law and decisions that where two claims are located upon a broad apex, the one which is oldest in point of time, is oldest in point of right, the oldest taking the extralateral rights for the entire vein. *Now the rule is also to the effect that when a patent has been granted that the patent relates back to the first step, viz: to the location; and in order to show that our right is older than theirs, we must go back to the location notice and we must go further as the authorities say, and show that from which we derive*

our title from the United States was based upon that particular location notice so as to tie our rights back to it.

MR. HILES: We object, for the reason that it does not appear that the location notice of the Old Jordan is material. This will involve a law question which will have to be decided, but of course we are not conceding that the older location takes the whole. We claim that having an older patent, if there be but one lode, if as they claim there be a broad lode,—we claim there is a lode there in Kempton and Ashland ground—but if there be a broad lode that we, having the older patent, would take, under the decisions, the extralateral rights, as against the junior patent with a senior location, and at this time I only want to note the objection, and save an exception.

THE COURT: It will be admitted subject to your objection, without a ruling at this time.

Again on page 571 of the record it appears that the complainant took the same question to the circuit court of appeals by its assignment of errors against the decree of the circuit court, because in its second assignment of errors, among other things occurs the following language:

2.—"Because the evidence showed that the plaintiff is and was the owner and in the possession of the Jordan and Gem Lode Mining Claims, mentioned and described in the bill of complaint in this cause, which said mining claims lie contiguous to and adjoining each other and southerly of the said Northern Light, Grizzly, Jordan Extension and Fairview Lode Mining Claims; that the ore bodies in controversy in this cause lying beneath the surface of the said last four named mining claims, all belong to a single broad vein or lode of rock in place, bearing gold, silver, lead and other metals, said vein or lode consisting of an altered and mineralized belt of limestone, from 100 to 200 feet in width and developed for about three miles, *upon a part of the width of the apex* of which said vein or lode the said Jordan and the said Gem Mining Claims, owned and possessed by the plaintiff, are located, so as to give the plaintiff extralateral rights upon said vein or lode for the entire width thereof upon the dip to and including the said ore bodies in dispute in this cause, and each and

all of them; *that although the Kempton Mining Claim, owned by the defendants, is also located upon a part of the width of the said apex of the said vein or lode, yet the said Jordan and said Gem Mining Claims, were duly and properly located long prior to the location of the said Kempton Lode Mining Claim, and that by virtue of said prior locations, the said Jordan and Gem Mining Claims were duly patented to the predecessors in title and interest of the plaintiff.*" (Record, pp. 571-572.)

But these errors which are so easy to see on this record, however conspicuous they may be, and however prejudicial and hurtful they obviously are to the property rights of the petitioners, might not justify your Honors in granting the writ prayed for unless the case comes within the statute as it is interpreted and applied by this court. The question then is, what is the rule, and does this case come within it?

In the case of in re Woods, in an opinion by his Honor the Chief Justice, you gave a general interpretation of the scope and effect of the statute in these words: "The Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern, and delayed suitors in the pursuit of justice. But in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under Section six for such supervision on our part, as would tend to avert diversity of judgments, and guard against inadvertence of conclusion, in controversies involving weighty and serious matters."

In re Woods, 143 U. S. 202-206.

Again in Forsyth vs. Hammond the court, speaking through his Honor Mr. Justice Brewer, said:

"We reaffirm in this case the propositions heretofore announced, to-wit, that the power of this court in *certiorari* extends to every case pending in the circuit court of appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court.

And further, that while this power is co-extensive with all possible necessities, and sufficient to secure to this court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us, that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal, and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Forsyth vs. Hammond, 166 U. S. 506-514.

In this case as before said there is a conflict of decision between the supreme court of the State of Utah and the circuit court of appeals respecting the interpretation and application of Sections 2325 and 2326 of the Revised Statutes of the United States.

Under the decision of the circuit court of appeals, a senior patent to a lode mining claim may be overthrown and cancelled by the owner of a junior patent covering the same ground if he can show that his location is prior to the location on which the senior patent is founded.

By the decision of the Supreme Court of Utah in Lavignino vs. Uhlig, a patent or right to a patent can not be thus assailed. By the decision of the circuit court of appeals the extralateral rights which are incident to all patents are non-existent in all senior patents to lode mining claims in Utah, in every case where a junior patentee can come in and show that the location on which his patent was based, is prior to the location on which the senior patent is founded, provided the apex of the lode is wider than the width of the senior patented claim. Whether such be the law, is a matter of general importance and concern. Such a determination affects not only these petitioners, but the stability of all broad lode patented titles in Utah. In Lavignino vs. Uhlig, the Supreme Court of Utah followed and adopted the decision of his Honor, Mr. Justice Brewer, at the circuit, in the case of Wight vs. Dubois, wherein he decided the point under notice in these words:

"First.—The Government as a land owner offers its lands for sale upon certain prescribed conditions, compli-

ance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere.

Second.—Publication of notice is process, bringing all adverse claimants into court, and if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land.

Third.—Thereafter, the only right or privilege remaining to any third parties is that of protest or objection filed with the Land Department and cognizable there only."

Wight vs. Dubois, 21 Fed. 693-696;
Lavignino vs. Uhlig, 26 Utah 1-20; 71 Pacific Rep. 1046.

Since the time of the filing of this petition this court has directly affirmed the decision of the Supreme Court of Utah in that very case, and on the point under notice. The decision of this court in Lavignino vs. Uhlig was rendered May 29th, 1905. In the opinion which was delivered by his Honor Mr. Justice White, Section 2326 of the Revised Statutes, is set out and is construed thus:

"This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice and performed the other acts made necessary to entitle to a patent, and who makes application for the patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section. Thus clearly providing that if there be a senior locator, possessed of paramount rights in the mineral lands for which patent is sought, he may abandon such rights, and cause them in effect to inure to the benefit of the applicant for a patent by failure to adverse, or, after adversing, by failure to prosecute such adverse."

Lavignino v. Uhlig;
U. S. Supreme Court Decision, May 29th, 1905.

The only difference between the case of Lavignino v.

Uhlig and this case, on the essential facts, is, that in the former case the adverse right in virtue of priority of location was set up before the issuance of the patent, but after the statutory time of publication of notice had expired, whilst here such adverse right is asserted many years after the issuance of the patents.

It is of course needless to cite reasons or principles or authorities to this court to prove that the decisions in Lavignino v. Uhlig are right.

Some explanation for the grave error into which the circuit court of appeals has fallen, may be found in a misapprehension of the relative location or position of the Kempton and Ashland claims to the Jordan and Gem claims, for example the court in its statement of facts says:

"The *southerly* side lines of the Kempton as patented, are in part *coincident with the northerly side lines of the old Jordan and Mountain Gem, as patented,* and the greater part of the width of the limestone is south of the lines so dividing the patented ground and is within the surface boundaries of the Old Jordan and Mountain Gem." (See opinion Circuit Court of Appeals, printed petition, page 19, line 26.)

A glance at the Old Jordan's patented plat on page 5 of this brief and opposite page 9 of the printed petition, will prove that the *south* side line of the Kempton is coincident with the *south* side line of the Old Jordan throughout the conflicting area, and that there is but little apex in controversy south of the south lines of the Kempton and Old Jordan. In other words the entire width of the Jordan claim is covered by the Kempton, throughout the area of conflict, as well as the greater part of the Mountain Gem which is a little fractional triangular piece of ground containing but five-sixths of an acre. But whatever may have been the cause or origin of the error, it is conspicuous and extraordinary.

II.

Another reason for granting the writ in this case is, that the decision of the circuit court of appeals is not in harmony with the decision of this court, on the effect of

an exception and exclusion in a lode claim patent, of conflicting areas embraced within senior and junior patents.

The circuit court of appeals has decided that the exceptions and exclusions in the Jordan and Mountain Gem patents in favor of the Kempton and Ashland patents do not constitute an estoppel by deed against the assertion by complainant of a superior title in virtue of the alleged prior locations of the Jordan and Gem claims.

This determination is contrary to the decision of this court in the case of the Argentine Co. v. Terrible Co., wherein effect was given to exceptions in a patent as follows:

"The defendants relied on the trial upon patents of the United States issued for its several claims, but those patents contain an exception which would also seem to exclude its pretensions. It is as follows, after the habendum clause, excepting and excluding, however, all that portion of said surface ground embraced by mineral survey No. 254, of the Adelaide Mining Claim, and also excepting and excluding all veins, lodes or deposits, the tops or apexes of which lie inside of the exterior lines of said Adelaide survey at the surface, extended down vertically, or which have been discovered and developed."

Argentine Co. v. Terrible Co., 122 U. S. 478-486.

Again this court has decided that one who relies on a deed to land containing an exception must plead and prove that he is without the exception, otherwise the grantee is estopped to assert that he has a superior title to the part thus excluded. This is so because:

"An exception in a grant, is said to withdraw from its operation, some part or parcel of the thing granted, which, but for the exception would have passed to the grantee under the general description. The effect in such cases, in respect to the thing excepted, is as though it had never been included in the deed. If for example, a person should convey to another a block of land, excepting therefrom, a certain lot previously conveyed, to sustain ejectment for any particular lot, it would be necessary for the pleading to show, that it was not the lot which had been

previously conveyed. There is a general rule applicable both to conveyances and statutes, that where there is an exception in the general granting or enacting clause, the party relying upon such general clause, must state in pleading the general clause, together with the exception, and must also show by testimony that he is not within the exception."

Maxwell Land Grant Co. vs. Dawson, 151 U. S. 586-604.

The suggestion that the exceptions in these patents relate only to the surface ground and not to the incidental extralateral rights, which title to, and possession of, the apex within the exterior surface boundaries legally secures, must be rejected. The proposition is not entitled to the slightest judicial indulgence, and any assertion for it of legal validity may safely be left unanswered.

III.

Still another reason for granting the writ prayed for is, that the circuit court of appeals has construed and applied in Section 3511 of the Revised Statutes of Utah of 1898 contrary to the construction and application given it by the supreme court of Utah, and thereby the defendants in this cause have been deprived of their constitutional right of trial by jury. When the amended bill in this cause was filed, the defendants demurred to it for want of equity in that it as shown on the face of the bill, that the dispute between the parties concerns the legal title and right to possession of the premises in controversy.

That there is also an entire *omission* in the bill to allege that the title of the complainant has been previously established at law, and that no impediment is alleged or shown to exist against an action at law being brought to establish complainant's alleged title and right to possession of the disputed premises. This demurrer was overruled by the circuit court, and thereafter the defendants answered and set up their legal title, possession and right to possession of the part of the lode in dispute. When the case was called for trial in the circuit court the

defendants objected to a trial without the intervention of a jury. (Record p. 46.)

Thereafter, when the complainant had concluded its testimony in its case in chief, the defendants made the motion which is set out on page 114 of the printed record, as follows:

"The defendants now come and move the court to dismiss the amended bill of complaint in this cause, or to enter an order directing that plaintiff be required to plead the facts which involve the issues at law in the case which appear on the face of the amended bill, and now in the evidence in support of it. This motion is made on the grounds:

First: That it appears by the amended bill of complaint that the defendants were at the time of the commencement of the action, and at the filing of the said amended bill, and are now in possession of the mine and lode mentioned in the said amended bill of complaint from the surface of the earth in Kempton and Ashland ground on its dip under the adjacent alleged mining claims called the Jordan Extension, Grizzly, Northern Light and Fairview claims.

Second: That it appears by the evidence that has been elicited by plaintiff in support of its said amended bill of complaint, that the defendants were at the time of filing said amended bill, and are now in possession of the mine and lode mentioned in the amended bill of complaint from the surface of the earth in Kempton and Ashland ground on its dip under adjacent surface ground of alleged mining claims called the Jordan Extension, Northern Light, Grizzly and Fairview claims. And the said defendants crave an order for, and hereby insist upon, and demand a trial by jury of their right to the possession of said mine and lode so as aforesaid shown by complainant's evidence to be and to have been at the commencement of this action in the possession of the defendants." (Record, p. 114.)

The foregoing motion was taken under advisement by the circuit court, and the trial of the cause was proceeded with without a jury, and evidence was introduced by the respective parties to prove the issues on the part of

each respectively, and thereafter the whole case was argued and submitted for decision, and thereafter, on the 23d day of March, A. D. 1903, the circuit court rendered its decree as follows:

"FINAL DECREE.

This cause came on to be heard at the May term, was argued by counsel and taken under advisement by the court, and thereupon upon consideration thereof it is ordered, adjudged, and decreed by the court:

First: That the motion made by the defendants, at the conclusion of the plaintiff's testimony in chief to dismiss the bill of complaint herein, or retaining the bill, to require plaintiff to commence an action at law to determine the ownership to the ores in dispute, be and the same is hereby overruled and denied.

Second: It is further ordered, adjudged and decreed by the court, upon the consideration of the pleadings, and all the evidence taken and given upon the hearing of said cause, that the Bill of Complaint herein be and the same is hereby dismissed at plaintiff's costs.

JOHN A. RINER, Judge,
JERROLD R. LETCHER, Clerk."

Filed March 23rd, 1903.

(Record, pp. 568 to 569.)

We have always insisted and do now insist that this bill is an ejectment bill, and that it ought to be dismissed by the court *meso motu* under the rule established by this court in numerous decisions.

Hipp vs. Bolim, 19 How. 271-278;
Parker vs. Winnipiseogee, 2 Black (U. S.), 550;
Lewis vs. Cocks, 23 Wall. 466-470;
Killian vs. Ebbinghaus, 110 U. S. 573;
Grand Chute vs. Winegar, 15 Wall. 373;
Allen vs. Pullman Car Co., 139 U. S. 658-662.

That it is fatally defective in not alleging that the legal title of the complainant has been previously established at law.

Boston Min. Co. vs. Montana Ore Purchasing Co., 188 U. S. 632-641.

Section 3511 of the Revised Statutes of Utah of 1898 reads as follows:

"Section 3511.—An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

Rev. Stat. Utah, 1898, Sec. 3511.

The circuit court of appeals has decided in this case, that this statute is applicable in suits to quiet title in the Federal courts of Utah.

That the statute obviates the necessity of alleging or proving that the legal title has been previously established at law. The decision by implication holds that where the questions of the legal title, possession and right to possession are put in issue, that those questions can be determined without the intervention of a jury, even though one of the parties demand a jury. This is contrary to the interpretation and application of the statute by the supreme court of Utah.

In the case of Park vs. Williamson the supreme court of Utah has construed and applied said Section 3511 as follows:

"Actions to quiet title, or to determine adverse claims under Section 3511, Revised Statutes, 1898, may be of a legal or equitable character, depending upon the pleadings; but where there are both equitable issues, and issues of fact in the case, the court should first determine the equitable issue, and then submit the issues of fact to a jury upon proper instructions, and a failure to do so constitutes reversible error."

Park vs. Williamson, 21 Utah 279-285.

Moreover, this statute of Utah was borrowed or adopted by its legislature from California, with that construction and interpretation upon it by the supreme court of the latter state.

Section 3511 of the Revised Statutes of Utah, is in the exact language of Section 758 of the Code of Civil Procedure of California. The statute has existed in California in substantially its present form from the earliest times. As early as 1860, Mr. Justice Field, then of the supreme

court of California, and subsequently a member of this court, defined the scope and limits of the statute in a decision which has ever since been followed both in California and Utah. In that decision, that eminent jurist, among other things, said:

"Under the statute of this state, it is unnecessary for the plaintiff to delay seeking the equitable interposition of the court, until he has been disturbed in his possession by the institution of a suit against him, and until judgment in such suit has passed in his favor. It is sufficient if, whilst in the possession of the property, a party out of possession claim an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim require the nature and character of the adverse estate or interest, to be produced, exposed and judicially determined, and the question of title be thus forever quieted. It does not follow, from the fact that the suit is brought in equity, that the determination of questions purely of a legal character in relation to title, will necessarily be withdrawn from the ordinary cognizance of a court of law. The court sitting in equity may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings and submitted to a jury. Upon the verdict of the jury, if a new trial be not granted, the court will then act, by either dismissing the bill, or adjudging the adverse estate or interest claimed to be invalid, and of no effect, and awarding a perpetual injunction against its assertion to the property in question."

Curtis vs. Sutter, 15 Cal. 260-263;
See also Donahue vs. Meister, 88 Cal. 121-123;
Newman vs. Duane, 89 Cal. 597-598.

We have denied that the statute is applicable in trials in the Federal courts, and for the simple reason that, legal and equitable remedies can not ordinarily be administered in the same suit in a Federal court, as under these state, so-called Reformed Codes of Procedure, they may in a state court, but if we are in error in this, and the code is applicable in suits to quiet title in the Federal courts of Utah, then it ought to be construed and applied in the

same way as it is construed and applied in the courts of those states and the right to trial by jury be thus preserved.

If this cause had been tried in a state court of Utah, the defendants would have had a jury trial without question.

In the light of the first clause of the Seventh Amendment to the Constitution of the United States, shall it be said that the right of trial by jury is less secure in a Federal court, than in a state court? This court has said more than once, that this is a matter of substance and not of form; and that you have always jealously guarded the right of trial by jury.

This though nominally a suit in equity to quiet title, is in the first instance a suit at common law to determine the legal title and right to possession of the part of the lode in dispute.

In Parsons vs. Bedford, Mr. Justice Story expounded the first clause of the Seventh Amendment to the Constitution of the United States thus: By common law they (the framers of the Amendment) meant what the Constitution denominated in the third article "law," not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction, to those where equitable rights alone were recognized and equitable remedies were administered."

Parsons vs. Bedford, 3 Pet. 443-446.

In Whitehead vs. Shattuck, and in Scott vs. Neely, this court preserved the right of trial by jury, by overruling and disregarding attempted blendings of matters properly cognizable at law, with a demand for equitable relief in the same action.

Whitehead vs. Shattuck, 138 U. S. 146;
Scott vs. Neely, 140 U. S. 109.

No decree to quiet title, and no injunction against the assertion of an adverse estate or title, can ever be entered in any case until the dispute as to whether the plaintiff or the defendant has the legal title. Here is a case where an appellate court has in an equity suit, as upon a trial *de novo*

in that court, without the intervention of a jury, determined a question of disputed title, possession and right to possession of land, against a defendant, who demanded a trial by jury. Then having thus determined these issues at law against defendants, a decree is entered which provides for the ousting of defendants from these mines, and their delivery to the complainant. This is to be done not by a writ of restitution upon a verdict and judgment at law, but by a writ of injunction.

The limits which we have assigned to this brief will not permit, and the knowledge which we have, that your Honors are entirely familiar with the principles above referred to, and their various applications, forbid more elaboration.

In conclusion, we reiterate what is noted in the petition, that we are prosecuting a motion for the allowance of an appeal directly from the circuit court, to this court from that part of the decree of the circuit court of March 23rd, 1903, which denied our motion for a trial by jury, under the fourth condition of Section five of the Act of March 3rd, 1891, creating the circuit courts of appeals, which in substance provides that an appeal may be taken from the circuit court to this court, in any case which involves the construction or *application* of the Constitution of the United States. The decree of the circuit court in the first instance, was altogether in favor of the petitioners on the merits, and the bill was dismissed absolutely.

The petitioners could not, therefore, appeal from that decree until it had been vacated, and another decree had been entered in favor of the respondent, under the direction of the circuit court of appeals. It is asserted by the respondent, that the question of petitioners' right to a trial by jury, and the validity of their motion therefor, was determined by the circuit court of appeals adversely to petitioners, on the respondent's appeal to that court. We can not see what reason there is for holding that the petitioners can be cut off from their right to a direct appeal to this court, upon the constitutional question involved in their motion for a trial by jury, by anything which the circuit court of appeals may have said or decided, on the

respondent's appeal to that court. The record shows that the question of the validity of petitioners' motion for a trial by jury was not before the circuit court of appeals, by any assignment of error made by the respondent, and if it had assigned error against that part of the decree which denied our motion for a jury trial, it would have been disregarded by the circuit court of appeals, because that part of it was in respondent's favor. But if this contention of the respondent be true in law, the circumstance affords an additional ground and reason for the exercise by this court of its power of review of the action of these subordinate courts. Otherwise we have a case, where a great constitutional right of the petitioners has been concluded against them, in a case where they have had no opportunity to be heard on their own appeal, and a case where they have been cut off from their right to *elect* whether they will appeal on the question under notice, to the circuit court of appeals, or directly from the circuit court to this court. To say that the other party, by its appeal to the circuit court of appeals, can cut us off from the right to elect whether we will appeal on the question at issue from the circuit court to the circuit court of appeals or directly from the former court to this court, is contrary to the declaration of this court in Loeb vs. Columbia Township Trustees, where it is said:

"The plaintiff was not bound to go to the circuit court of appeals, and thereby cut himself off from the right to have this court declare whether the circuit court erred in holding that the state law upon which he relied for judgment was repugnant to the Constitution of the United States."

Loeb vs. Columbia Township Trustees, 179 U. S. 472-479.

If the law does not bind us to the circuit court of appeals, as the tribunal by which we are to have this constitutional question determined, how can the action and appeal of the opposing party bind us, and cut us off, from the right of direct appeal to this court? But if we can

be thus cut off, we repeat, that that is an additional reason for the granting of the writ prayed for.

Respectfully submitted,

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